No. 93-518

In The

Supreme Court of the United States

October Term, 1993

FLORENCE DOLAN,

Petitioner,

v.

CITY OF TIGARD,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Oregon

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF OREGON ASSOCIATION OF REALTORS IN SUPPORT OF PETITIONER FLORENCE DOLAN

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Pursuant to Supreme Court Rule 37, the Oregon Association of Realtors respectfully moves for leave to file the attached amicus curiae brief in support of petitioner, Florence Dolan. Counsel for petitioner has consented to the filing of this brief and such consent has been lodged with the Clerk of this Court. Respondent City of Tigard has refused to consent to the filing of this brief. Therefore, amicus files this motion.

IDENTITY AND INTEREST OF AMICUS CURIAE

The Oregon Association of Realtors is a nonprofit, professional association of commercial and residential realtors in the state of Oregon with approximately 12,000 members. The Association and its members have been involved in litigation at various times in support of individuals' rights in property. Amicus and its members are deeply concerned about the extent to which government may legally restrict the use of land. Real property is the substance of its members' business and "[t]he substantial value of property lies in its use." *Ackerman v. Port of Seattle*, 55 Wash. 2d 400, 409, 348 P.2d 664, 669 (1960). Conditions imposed on use, therefore, influence the marketability of land.

Members of the Oregon Association of Realtors advise the public on the attributes of land affecting its value. The Oregon Supreme Court's decision in this case allows government to attach conditions to otherwise permitted uses of property based on speculative impacts the government might imagine could result from proposed uses of property. The value of property depends on a number of interdependent factors, particularly including the extent to which government can impose conditions, especially exactions, on uses. If conditions can be imposed on the basis of conjecture

and without proof as allowed by the Oregon Supreme Court, property values will become more unstable than what naturally occurs in the market and will leave people with greater uncertainty and risk. The Oregon Association of Realtors' concern and experience with these issues will amplify the argument presented in the pending Petition for Writ of Certiorari.

Counsel for amicus has briefed the issues in this case to the Oregon Supreme Court on behalf of another amicus curiae and, therefore, is familiar with the issues and the scope of their presentation. Counsel for amicus has also participated in numerous cases in federal and state courts involving conflicts between property regulation and the Constitution. Amicus seeks to file the attached brief to explain and demonstrate the broad interest in the pending Petition for Writ of Certiorari and its concern over the confused status of the law regarding the essential feature of its members' livelihood: land and the rights inherent in land.

The Oregon Association of Realtors, therefore, respectfully requests the Court to grant this motion for leave to file the attached amicus curiae brief.

DATED: November, 1993

Respectfully submitted,

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AMICUS CURIAE BRIEF OF OREGON ASSOCIATION OF REALTORS IN SUPPORT OF FLORENCE DOLAN'S PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED FOR REVIEW

1. Where a permit exaction is challenged as a taking, does *Nollan* require a "substantially related" degree of judicial scrutiny of the exaction and its "essential nexus" to the impacts of a proposed development, rather than the "reasonably related" degree of scrutiny used by the Oregon Supreme Court?

2. Where a permit exaction is challenged as a taking, did the Oregon Supreme Court err in holding that a legally sufficient nexus exists when the local government makes findings that its imposed exactions are reasonably related to the increased intensity in use of the subject property, even though those findings are at best merely *ipse dixit*, and at worst demonstrate only a potential increase in intensity of use, rather than a bona fide impact directly caused by the development?

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UNITED STATES CONSTITUTION

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IDENTITY AND INTEREST OF AMICUS CURIAE

The identity and interest of amicus curiae is set forth in the preceding motion. Amicus curiae adopts that explanation of its identity and interest herein.

OPINION BELOW

The opinion of the Oregon Supreme Court is reported as *Dolan v. City of Tigard*, 317 Or. 110, 854 P.2d 437 (1993), and is reproduced in Appendix A to the Petition for Writ

of Certiorari to the Oregon Supreme Court (hereinafter Appendix).

STATEMENT OF THE CASE

Petitioner, Florence Dolan, is the owner of commercially zoned land in the City of Tigard, Oregon, on which a retail electric and plumbing supply store is operated. Mrs. Dolan and her now late husband sought approval to raze the existing 9700 square foot building and replace it with a larger, 17,600 square foot building. Appendix D-3. The City was willing to grant permission for that new construction only if the Dolans would dedicate to the City two pieces of property. One is the entire portion of their lot which lies within the 100-year floodplain for use by the City as a part of a system of recreational greenways connected to Fanno Creek Park, a park owned and operated by the City. The other required dedication is an additional 15 feet along the greenway, above the 100-year floodplain, for future reconstruction of a storm drainage channel and for a pedestrian and bicycle pathway. The Dolans were also required to construct the pathway itself. Appendix D-6.

The Dolans sought a variance from these conditions on the grounds that their imposition constituted a taking of their property in violation of the Fifth and Fourteenth Amendments. The City denied the variance requests because a variance "would conflict with the City's adopted policy of providing a continuous pathway system intended to serve the general public good." Appendix G-26. Similarly, in regard to the greenway, the City decided that "[n]ot requiring dedication of this area as a

condition of development approval, as the applicant's variance proposal requests, would clearly conflict with the purposes and policies of the Comprehensive Plan, Community Development Code, and the City's *Master Drainage Plan*." Appendix G-39.

The Dolans then sought review in the Oregon Land Use Board of Appeals (LUBA), which has exclusive jurisdiction over all challenges to land use decisions, including those based on constitutional grounds. ORS 197.825(1) and 197.828(2)(c)(B). LUBA, and then the Oregon Court of Appeals, rejected the Dolans' constitutional claim.

On review, the Oregon Supreme Court affirmed the Court of Appeals' decision. Specifically, the Oregon Supreme Court ruled that the City need only show a "reasonable relationship" between the conditions and the impacts of the Dolans' proposed development. Appendix A-13. According to the Oregon court, such relationship was shown in the City's findings when it concluded that the bicycle pathway would serve the transportational and recreational needs of the employees and customers of the business located in the Dolans' larger building. Appendix A-16. A reasonable relationship was also established in the view of the Oregon Supreme Court for the floodplain dedication because the larger building would increase the parcel's impervious surface area and, therefore, increase storm water runoff. Appendix A-17. Justice Peterson filed a dissenting opinion. Appendix A-23.

Having been unsuccessful in her attempts to obtain relief from the Oregon courts, Mrs. Dolan has filed the pending Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

Rule 10 of the Supreme Court identifies factors the Court deems important to determining whether a petition for a writ of certiorari should be granted. Two sections of Rule 10.1 are applicable here.

> When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

Rule 10.1.(b).

> When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Rule 10.1.(c). Each of these factors call for the granting of the petition in this case.

I

THE OREGON SUPREME COURT HAS DECIDED FOR FIFTH AMENDMENT PURPOSES THAT THE NATURE OF JUDICIAL REVIEW OF CONDITIONS IMPOSED ON THE USE OF PROPERTY IS SEVERELY LIMITED IN CONFLICT WITH THIS COURT'S DECISION IN *NOLLAN V. CALIFORNIA COASTAL COMMISSION*

The central question of this case concerns how the Constitution requires courts to examine conditions attached to permits to use privately owned property. This Court settled some of those issues in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). In *Nollan*, this

Court reviewed a permit to replace an existing beach front dwelling with a larger home on the condition that the owners dedicate an easement for public access along their privately owned beach. The Court concluded that such a condition violated the Takings Clause of the Fifth and Fourteenth Amendments because the condition failed to substantially advance a legitimate government interest. *Nollan*, 483 U.S. at 835 (citing *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

This Court in *Nollan* recognized that requiring the easement outright would have constituted a taking of property since an easement is an interest in land and the resulting physical invasion of land has long been considered a taking of property. 483 U.S. at 831-32 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)). The question in *Nollan* was whether a taking occurred when such a dedication was required only as a condition attached to a land-use permit. The same question is at issue in the present case.

In *Nollan*, this Court developed a two-stepped approach. First, the government must have the authority to deny the permit altogether. Then and only then, can the government lift the ban and grant the permit subject to a "condition which serves the same legitimate police-power purpose as a refusal to issue the permit." 483 U.S. at 836. Any attempt to acquire more than that which would mitigate harms caused by the proposal would constitute a form of " 'extortion.' " *Id.* at 837 (quoting *J.E.D. Associates, Inc. v. Atkinson*, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981)). Conditions not designed to resolve actual public burdens caused by the proposal would result in a "leveraging of the police power" whereby

unnecessarily strict land use controls are adopted for the purpose of bargaining them away for something the government really wants, but cannot take directly without paying compensation. *Nollan*, 483 U.S. 837 n.5.

The Oregon Supreme Court never evaluated whether the City of Tigard could have denied the Dolans' permit on the basis that the larger building would have created too great a burden on bicycle traffic or storm water drainage or recreational "greenway" needs. It is highly suspect that such a denial would have been proper. After all, the City found that the Dolans' "use is permitted outright in the CBD (Central Business District) zone." Appendix G-16. Unfortunately for the Dolans, the property was also located in and adjacent to the 100-year floodplain which the City had marked out as its *quid pro quo* for any new development. Hence, the first step in the analysis required under *Nollan* was not taken.

The second step of comparing the condition to the basis for an outright denial was taken in a faulty manner. This Court explained the problem with allowing government to condition property usage on exactions which are not directly tied to an impact which would justify an absolute prohibition.

> The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but

> granted dispensations to those willing to contribute $100 to the state treasury. . . . The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation.

Id. at 837.

Critical to this analysis is the question of the level, scope, or nature of judicial review of the condition itself and the harm the condition must alleviate in order to be valid. May the harm be hypothetical? May it be one which is reasonable to assume will or might result from the proposed use? Is there no need to proportion the extent of the condition to the extent of the harm? While these questions may not have been completely answered, one would expect that this Court gave sufficient guidance in *Nollan* for courts to know that imaginary, hypothetical or merely assumable impacts are insufficient. Neither can a minimal impact be used to insist on a major contribution to the City.

First, *Nollan* made clear that in order for a condition to be imposed on the use of private property, the government must do more than merely assert that the condition is legitimate in a conclusory fashion. While the dissent in *Nollan* argued that the Coastal Commission could easily demonstrate a connection between the building of a larger home and the easement exaction, the majority rejected that claim by stating the Fifth Amendment requires more than merely reciting talismanic findings. Specifically, this Court stated:

> We view the Fifth Amendment's Property Clause to be more than a pleading requirement,

> and compliance with it to be more than an exercise in cleverness and imagination. As indicated earlier, our cases describe the condition for abridgment of property rights through the police power as a "*substantial* advanc[ing]" of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is a heightened risk that the purpose is avoidance of the compensation requirement rather than the stated police power objective.

Nollan, 483 U.S. at 841 (emphasis in original).

Second, the Court's discussion and contrast of the Takings Clause with the rational basis test of the Due Process Clause mandates that courts not attempt to justify conditions to alleviate hypothetical burdens or ones which may be "assumed."

> [O]ur opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved. *Agins v. City of Tiburon*, 447 U.S. 255, 260, . . . not that "the State *'could rationally have decided'* that the measure adopted might achieve the State's objective."

Nollan, 483 U.S. at 834 n.3 (quoting 483 U.S. at 843 (Brennan, J., dissenting) (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981))). Hence, because a specific protection of the Constitution is at stake, namely

the Takings Clause, this Court required more than the speculative, hypothetical, or assumable justification often allowed under the rational basis test of substantive due process.

This is where the Oregon Supreme Court took an unmistakable departure from this Court's precedent. The Oregon court used hypothetical or "assumable" burdens to be the ones which supposedly justify the demand that Mrs. Dolan give up some of her property. These are the City's critical "findings."

> "It is reasonable to **assume** that customers and employees of the future uses of this site **could** utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and **recreational needs**.
>
> In fact, the site plan has provided for bicycle parking in a rack in front of the proposed building to provide for the needs of the facility's customers and employees. It is reasonable to **expect** that some of the users of the bicycle parking provided by the site plan will use the pathway adjacent to Fanno Creek if it is constructed.

Appendix G-24 (emphasis added). Of course, the rack was required by the City. Appendix G-21.

The City did not prove anything about the Dolans' proposal. (In fact, it placed the burden on the Dolans to prove that the taking of property was unconstitutional. Appendix G-7, G-40.) Nevertheless, the City merely concluded that it could assume that some employees or customers of the plumbing business might use the pathway. Of course, they may also visit other facilities operated by the City of Tigard as well. Under the Oregon

Supreme Court's analysis there is no reason Mrs. Dolan or people like her could not be singled out to provide a wide array of resources to potential customers of the electrical and plumbing supply store.

There is nothing in the City's "findings" to quantify the increased need for bicycle paths occasioned by increasing the plumbing store's size, if any need will occur at all. As noted by dissenting Justice Peterson, it appears that the City is more concerned about having an uninterrupted pathway than with making sure that those who create the "need" for the pathway, pay for it. Appendix A-23. A similar argument was made and rejected in *Nollan*, 483 U.S. at 841.

The City's "findings" to support the dedication of the floodplain for the greenway fare no better.

> [T]he Commission finds that the required dedication would be reasonably related to the applicant's request to intensify the usage of this site thereby increasing the site's impervious area. The increased impervious surface would be **expected** to increase the amount of storm water runoff from the site to Fanno Creek. The Fanno Creek drainage basin has experienced rapid urbanization over the past 30 years causing a significant increase in stream flows after periods of precipitation.

Appendix G-37 (emphasis added).

As explained by dissenting Justice Peterson, there is no identification of how much storm water runoff will increase – perhaps a "thimbleful." Appendix A-26. Similarly, demanding the dedication of property within the 100-year floodplain for storm water purposes while at the

same time requiring a dedication of land **outside** the 100-year floodplain for reconstruction of a flood control channel suggests that the City is interested in something other than storm drainage for the floodplain. Appendix at G-42. The real reason for requiring the dedication of land within the floodplain has nothing to do with storm water, but on the reasons explained in the City's ordinance itself: recreation. *See* Appendix G-42. While the plans for community recreational facilities may be legitimate, the plan to acquire the land by holding Mrs. Dolan's permit hostage is not.

As to the nature of the "fit" between the condition and the public burden the condition is supposedly designed to alleviate, the Court in *Nollan* accepted the California Coastal Commission's claim that the condition need only be "reasonably related." 483 U.S. at 838. However, this Court did not rule a "reasonably related" test was the standard. The Court accepted such language only "for purposes of discussion" because the California Coastal Commission was unable to prove that the condition was even reasonably related to any public harm. 483 U.S. at 838.

It was at this point this Court cited a list of cases indicating that conditions on the use of property which are not reasonably related to a public burden that would justify a total prohibition constitute a taking of property. The first in the list was *Parks v. Watson*, 716 F.2d 646, 651-53 (9th Cir. 1983), *cited in Nollan*, 483 U.S. at 839. The Oregon Supreme Court relied heavily on the *Nollan* decision's citation of *Parks* and concluded that "reasonably related" must be the test. Appendix A-12.

However, the Oregon Supreme Court failed to realize that *Parks*, like *Nollan*, involved a condition which had no connection to the proposal and, therefore, could not survive even the most "untailored" standards. *Nollan*, 483 U.S. at 838. In *Parks*, the property owner was told that the city would vacate platted streets only if the owner gave to the city his geothermal wells. 716 F.2d at 649. The Ninth Circuit could not imagine any connection between street vacation and the required give-away of private geothermal wells. That the conditions in *Parks* and *Nollan* could not even survive the most deferential standard of review does not establish that the Takings Clause never requires a closer look at conditions which may be more cleverly drafted.

As discussed above, this Court's comparison of the Taking Clause to the rational basis test of the Due Process Clause belies the notion the level of review is so minimal as to allow "assumed" impacts to suffice. Yet, the Oregon court's reliance on a "reasonably related" test in all practicality operates just like the rational basis test of the Due Process Clause. Government could assume many "impacts" from Mrs. Dolan's increased plumbing business. If she is required to contribute land for her employees and customers' recreational needs, what other needs must she satisfy? The need for education, police protection, food stamps?

The City of Tigard's ordinances indicate that all new development must contribute to the bicycle path and the greenway and the storm drainage system if the owner happens to own property in the path of these proposed improvements. The City code only applies to land which is in or adjacent to the floodplain. *See* Appendix K (Tigard

Community Development Code, section 18.120.180) and Appendix J (policies indicating the same). A bicycle shop does not need to dedicate land for the creation of bicycle paths if the shop's property is not located along the proposed pathway. Proposals which may equally increase the impervious surface area but do not include land in the floodplain are not subject to the conditions imposed on Mrs. Dolan, even though the impacts, if any, are identical.

This Court in *Nollan* warned about such abuses.

> If the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause. One of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

Nollan, 483 U.S. at 835-36 n.4 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

The Oregon Supreme Court's ruling that the Takings Clause only requires a "reasonable relationship" between the conditions and assumable impacts of the use clearly conflicts with this Court's ruling that the Takings Clause requires more than a rational basis. The use of "assumed" impacts conflicts with *Nollan*'s disapproval of substituting cleverness and imagination for proof. Amicus urges the Court to grant the pending Petition for Writ of Certiorari.

II

THE OREGON SUPREME COURT HAS DECIDED FOR FIFTH AMENDMENT PURPOSES THAT THE NATURE OF JUDICIAL REVIEW OF CONDITIONS IMPOSED ON THE USE OF PROPERTY IS SEVERELY LIMITED IN CONFLICT WITH DECISIONS OF OTHER COURTS

The Oregon Supreme Court's decision in this case demonstrates another conflicting permutation on the way courts are expected to apply the Fifth Amendment to conditions imposed on the use of property. New York's highest court of last resort in *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 542 N.E.2d 1059, *cert. denied*, 493 U.S. 976 (1989), was faced with applying *Nollan* to a requirement that owners of low income housing pay a $45,000 fee for every unit of housing they would remove from the rental market. Recognizing that the substantial advancement test of *Nollan* is an analysis of the **means** of acquiring the asserted interest, the New York Court concluded there must be a "close nexus" and "semi-strict or heightened judicial scrutiny." *Id.* at 111, 542 N.E.2d at 1068.

The Massachusetts Supreme Court came to a similar conclusion in *Steinbergh v. City of Cambridge*, 413 Mass. 736, 604 N.E.2d 1269 (1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2338 (1993), but with an unexplainable twist. The court held that the substantial advancement test "may express a higher standard at least in certain circumstances than the rational basis test commonly applicable in deciding whether an exercise of the police power satisfies due process or equal protection requirements." *Id.* at 745, 604 N.E.2d at 1276 (citing *Nollan*, 483 U.S. at 834 n.3).

Then, oddly enough, the Massachusetts court placed the burden of proving the test was not met on the private land owner. 413 Mass. at 745, 604 N.E.2d at 1276.

The California Court of Appeal in *Surfside Colony, Ltd. v. California Coastal Commission*, 226 Cal. App. 3d 1260, 277 Cal. Rptr. 371 (1991), also recognized that *Nollan* requires a closer look at the condition and the public burdens supposedly mitigated by the condition. A public access easement condition imposed on the construction of a revetment was invalid, even though revetments generally cause beach erosion, because no evidence showed that the particular revetment at issue caused erosion. *Id.* at 1268, 227 Cal. Rptr. at 376. The Oregon Supreme Court's approval of impacts which were hypothetical, assumable, and completely unquantified conflicts with these decisions.

This Court should grant the pending Petition for Writ of Certiorari to resolve the conflict between the Oregon Supreme Court and the courts of New York, Massachusetts and California. Since the use of the police power to pressure private parties to provide public benefits is in vogue today, the Court should ensure that the Constitutional rights of citizens not vary from jurisdiction to jurisdiction.

III

IN LIGHT OF THE WIDESPREAD CONFUSION AMONG COURTS ATTEMPTING TO APPLY *NOLLAN V. CALIFORNIA COASTAL COMMISSION*, THIS COURT SHOULD SETTLE THESE IMPORTANT QUESTIONS OF LAW

The differences between the New York, Massachusetts, California and Oregon cases are not the only evidence that these issues are unsettled. Many state and federal

courts which have attempted to apply this Court's ruling in *Nollan* to various types of conditions on the use of land have come to a wide array of approaches.

For instance, in *Sintra, Inc. v. City of Seattle*, 119 Wash. 2d 1, 829 P.2d 765, *cert. denied*, ___ U.S. ___, 113 S.Ct. 676 (1992), the Washington Supreme Court evaluated a housing preservation ordinance which required that those who seek to convert low income housing to other uses pay a fee to provide another, replacement source of low income housing. Surprisingly, the court ruled that "[t]his is not an exaction case, however, because no physical invasion has been effected by the [Housing Preservation Ordinance]. Thus contrary to Sintra's arguments, the *Nollan* nexus test does not apply." *Id.* at 16 n.7, 829 P.2d at 773 n.7.

The Washington Supreme Court also strangely applied the takings test which requires land use restrictions to "substantially advance a legitimate government interest" to the low income housing fee. "Here, the regulation must fairly be said to substantially advance a legitimate interest of the City in protecting its low income housing supply. If the regulation were valid, of course, the money could alleviate any housing shortage." *Id.* at 16-17, 829 P.2d at 774.

The *Sintra* court's discussion suggests that in the exaction context substantial advancement is nothing more than a check to see if what the government wants is legitimate and to see if the regulation actually delivers what the government wants – as if the **means** were unimportant. Apparently believing the substantial advancement test of the Takings Clause to be powerless against unfair means of achieving legitimate interests, the court

in *Sintra* went on to rule that this fee violated substantive due process instead. *Id.* at 24, 829 P.2d at 778.

Some divisions of the California Court of Appeal has come to similarly divergent conclusions. *Blue Jeans Equities West v. City and County of San Francisco*, 3 Cal. App. 4th 164, 171, 4 Cal. Rptr. 2d 114, 118, *cert. denied*, ___ U.S. ___, 113 S.Ct. 191 (1992) ("we hold that any heightened scrutiny test contained in *Nollan* is limited to possessory rather than regulatory takings cases"); *City and County of San Francisco v. Goldon Gate Heights Investments*, 14 Cal. App. 4th 1203, 18 Cal. Rptr. 2d 347, *cert. denied*, ___ U.S. ___, 62 U.S.L.W. 3724 (1993); *Ehrlich v. City of Culver City*, 15 Cal. App. 4th 1737, 19 Cal. Rptr. 2d 468 (1993)("Monetary exactions compelled as a condition of approval must be only rationally related to the government interest"). These rulings that *Nollan* does not apply to conditions which do not involve a physical invasion of property presume the California Coastal Commission would have been successful had it required the Nollans to pay a fee which the Commission used to purchase the easement, rather than require the easement directly.

The Ninth Circuit in *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872, 873 (9th Cir. 1991) *cert. denied*, ___ U.S. ___, 112 S.Ct. 1997 (1992), looked only for a rational relationship between the condition and the development. More importantly, the court in *Commercial Builders* practically changed the review of permit conditions from *Nollan*'s substantial advancement test to a "no evidence" test.

> *Nollan* does not stand for the proposition that an exaction ordinance will be upheld only where it can be shown that the development is directly

> responsible for the social ill in question. Rather, *Nollan* holds that **where there is no evidence of a nexus** between the development and the problem that the exaction seeks to address the exaction cannot be upheld.

Id. at 875 (emphasis added). *Nollan* must require something more than a complete lack of evidence or else the Court's contrast of the Takings Clause and the rational basis test of the Due Process Clause is meaningless. 483 U.S. at 834 n.3.

Because this Court in *Nollan* held that the California Coastal Commission could not even show a reasonable relationship and a such a relationship is all California law required, an appellate court in North Carolina thought the extent of judicial review for Fifth Amendment purposes hinged on **state** law. *Batch v. Town of Chapel Hill*, 92 N.C. App. 601, 376 S.E.2d 22, 31 (1989), *rev'd on other grounds*, 326 N.C. 1, 387 S.E.2d 655, *cert. denied*, 496 U.S. 931 (1990).

In another case, the Ninth Circuit understood that *Nollan* requires more than a stamp of approval on assumed public burdens to be addressed by the conditions on land use in *Azul Pacifico, Inc. v. City of Los Angeles*, 948 F.2d 575, 582 (9th Cir. 1991) ("relationship between the means and the ends must be closer for purposes of takings clause analysis"). However, the opinion was vacated on the grounds that the Takings Clause in the Fifth Amendment is not self-executing and, hence, the property owner could not assert a claim directly under the Constitution. *Azul Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704 (9th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1049 (1993).

Courts are in confusion. On one hand *Nollan* clearly commands that the Takings Clause requires a stricter level of scrutiny than the rational basis test of the Due Process Clause, coupled with an understanding that the substantial advancement test is more than a pleading requirement and requires the government to prove its condition meets the test. On the other hand, the Court assumed for the sake of argument that the Coastal Commission needed only to show a reasonable relationship between the condition and the public burdens because the Commission could not even make that showing.

This state of confusion has serious affects for those who own or hope to own real property. While the real estate market like all investments has some degree of risk for the individual, allowing government to impose conditions to alleviate public burdens which are assumed, imagined and completely unmeasured exacerbates the uncertainty in the value of real estate. If nothing more need be shown than what is in the City of Tigard's "findings," property use will be subject to the unquenchable desire for public improvements at no cost to the public. The value of property subject to practically unlimited demands for contributions to the public is anyone's guess. Limiting exactions based on real public burdens, however, adds certainty to one's property values.

The resolution of this case will settle these important issues. Can government condition property usage on hypothetical, assumable, and completely unquantified public burdens? If the Oregon Supreme Court decision is allowed to stand, *Nollan* will be practically meaningless since, when cleverness and imagination run rampant, just

about any government desire can be assumed to be related to a private property owner's proposal.

CONCLUSION

As government increasingly looks for new ways to provide public benefits, the insistence that those who seek a government permit satisfy the government's plans in order to obtain the permit is becoming increasingly common. As explained by Justice Beezer in his dissent in *Commercial Builders*, "legislators find it politically more palatable to exact payments from developers than to tax their constituents. The Takings Clause prohibits singling out developers to bear this burden." 941 F.2d at 876 (Beezer, J., dissenting).

If the Oregon Supreme Court decision in the present case remains, singling people out will become the order of the day, for it is far easier to place public burdens on relatively small groups of people than it is to proportion burdens evenly throughout society. Amicus curiae respectfully requests the Court to grant the Petition for Writ of Certiorari filed in this case and settle these significant issues.

Respectfully submitted,

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